1990

State of Utah v. Rodney B. Jensen : Brief of Appellee

Utah Court of Appeals

John D. Russell; Attorney for Appellant.
R. Paul Van Dam; Attorney General; Marian Decker; Assistant Attorney General; Attorneys for Appellee.

DOCKET NO. 900257-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
		Case No. 900257-CA
Plaintiff/Appellee,	:	
		Priority No. 2
v.	:	
RODNEY B. JENSEN,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FOLLOWING A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1990); POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5 (1990) AND CARRYING A CONCEALED DANGEROUS WEAPSON, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-10-504 (1990) IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR BOX ELDER COUNTY, STATE OF UTAH, THE HONORABLE F.L. GUNNELL, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
MARIAN DECKER (5688)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

JOHN D. RUSSELL
10 West Broadway
Suite 500
Salt Lake City, UT 84101

Attorney for Appellant

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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

JOHN D. RUSSELL
10 West Broadway
Suite 500
Salt Lake City, UT 84101

Attorney for Appellant

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal following a conviction of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1990); possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1990) and carrying a concealed dangerous weapon, a class A misdemeanor, in violation of Utah Code Ann. § 76-10-504 (1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Did the trial court correctly find that the evidence introduced at trial was sufficient to convict defendant of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1990)?

The trial court's interpretation of section 58-37-8 poses a question of law reviewable for correctness. State v. Warner, 788 P.2d 1041, 1042 (Utah Ct. App. 1990).

2. Is defendant's sentence constitutionally proportionate, under the eighth amendment, to the gravity of the offense for which he was convicted?

This Court must grant substantial deference to the legislature and the sentencing court, as

> it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits.

Solem v. Helm, 463 U.S. 277, 290 n.16 (1983); State v. Bishop, 717 P.2d 261, 269 (Utah 1986).

3. Did the trial court properly sentence defendant to the statutory indeterminate term of from zero to five years?

This Court will not set aside a sentence unless it appears that the trial court abused its discretion, failed to consider all legally relevant factors, or the sentence imposed exceeded the limits prescribed by law. State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989) (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Rodney B. Jensen, was charged with possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1990); possession of drug paraphernalia, a class B misdemeanor, in violation of

Utah Code Ann. § 58-37a-5 (1990) and carrying a concealed dangerous weapon, a class A misdemeanor, in violation of Utah Code Ann. § 76-10-504 (1990) (Record [hereinafter "R."] at 33).[1] Defendant was convicted as charged following a jury trial on September 25, 1989 (R. at 102).

On October 5, 1989, defendant was released on bail pending imposition of sentence (R. at 136-37). A bench warrant was issued for defendant's arrest and his bail revoked on November 9, 1989 after he failed to appear for a hearing (R. at 140-42). Defendant subsequently appeared before the trial court on November 20, 1989 at which time the court ordered a presentence report (R. at 141). On December 12, 1989 defendant appeared for sentencing and the court ordered a 90-day diagnostic evaluation (R. at 146). Defendant filed a memorandum on March 3, 1990, requesting that he be placed on probation with the requirement that he participate in counseling for his alcohol and/or drug problem on the grounds that (1) the mitigating factors outweighed aggravating factors in his case and (2) a prison sentence would constitute cruel and unusual punishment (R. at 153). Following completion of the 90-day evaluation on March 19, 1989, the trial court ordered defendant to be held in the Box Elder County Jail pending sentencing (R. at 148, 152).

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[1] Defendant was originally charged with the above counts on December 28, 1988 (R. at 2). In an amended information subsequently filed January 23, 1989, count II (possession of drug paraphernalia) was dropped and count III (carrying a concealed dangerous weapon) was reduced to the class B misdemeanor of carrying a loaded firearm (R. at 12). However, on March 1, 1989 the information was amended to again reflect the original charges (R. at 33).

Defendant was sentenced on April 9, 1990 to a term of not more than five years in the Utah State Prison for count I; six months in the Box Elder County Jail for count II and one year in the Box Elder County Jail for count III, all sentences to run concurrently. In addition, defendant was fined $2,000 and ordered to pay a surcharge in the amount of $500 as well as extradition costs as determined by the Adult Probation and Parole Department (R. at 225-26).

STATEMENT OF FACTS

Defendant was arrested on December 22, 1988 pursuant to a bench warrant that had been issued for his arrest on December 9, 1988 and taken to the Tremonton City Police Department (Transcript of jury trial, 9/25/89 [hereinafter "T."] at 13-15, 48-50). During the course of a pat-down search incident to defendant's arrest Officer Bill Beckmann discovered that defendant, who was wearing a long overcoat at the time, was carrying a .32 caliber automatic pistol in a hip holster (T. at 14-15). A further search of defendant's jacket revealed a box of .32 caliber cartridges in one pocket (R. at 14-17) and a brown cotton bag in another pocket containing a metal straw, mirror, razor blade and brown vial with a white powdery substance in it (T. at 17, 20).[2]

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[2] When Officer Beckmann discovered the brown cotton bag in defendant's pocket he asked him what it contained and defendant explained it was his first aid kit (T. at 17, 116). At trial defendant testified that he put the brown cotton bag in his coat and that he knew it contained a mirror, bottle and straw, but he believed the bottle was empty at the time (T. at 112, 115).

A field test performed on a sample of the powdery substance in the vial at the station revealed the possible existence of a controlled substance (T. 22, 39, 43). The brown bag together with the vial, straw, mirror and razor blade were then turned over to Arthur Terkelson at the Weber State College Crime Lab for further testing (T. at 62-64). Officer Beckmann asked Terkelson to test for the presence of cocaine and methamphetamine (T. at 44). Several tests were conducted on samples taken from the vial and metal straw which revealed the existence of methamphetamine (T. at 67-68, 74).[3] Although Terkelson did not weigh the exact amount of substance in the vial, he estimated that it contained approximately 15 to 25 milligrams which constituted "more than just residue" because "you can still pour some out" (T. at 75-76, 91-92).[4]

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[3] Terkelson apparently obtained three different samples from the vial (T. at 65-67). Using the first sample, he conducted a cobalt thiocyanate test which was negative for the presence of cocaine (T. at 66). He then took a second sample from the vial and performed a marquis test which revealed the presence of amphetamine (T. at 66-67). Finally, Terkelson apparently took a third sample from the vial for purposes of conducting a gas chromatograph which revealed the existence of methamphetamine (T. at 67-69).

In addition to the vial samples, Terkelson obtained a sample from residue remaining on both the metal straw and the mirror (T. 68, 88-89). A marquis test performed on the straw sample revealed the presence of amphetamine (T. at 68, 88-89). Along with the vial sample, the straw sample was then subjected to a gas chromatograph and similarly tested positive for methamphetamine (T. at 68, 89). Although Terkelson obtained a sample from residue remaining on the mirror, it was simply not enough to conduct a successful marquis test and was not subjected to the more sensitive gas chromatograph test (T. at 89).

[4] Terkelson surmised that the substance in the vial was probably not 100% pure based on the fact that it appeared consistent with illegal lab product (T. at 73, 83). Due to a number of varying factors, Terkelson could not say with certainty that the

At the conclusion of all the evidence defendant made a motion to dismiss the charge of possession of a controlled substance on the ground that the amount was insufficient to establish a third degree felony (T. at 119). The trial court denied defendant's motion on the ground that the quantity of methamphetamine in his possession was sufficient (T. at 121-122; a copy of the trial court's oral findings is attached hereto as Addendum A).

SUMMARY OF ARGUMENT

Relying primarily upon case law and policies expressly rejected by this Court in State v. Warner, 788 P.2d 1041 (Utah Ct. App. 1990), defendant argues that the 15 to 25 milligrams of the controlled substance methamphetamine found in his possession is simply insufficient to establish that his possession was knowing and intentional. Although this Court has rejected the requirement of some specific "usable amount" in order to sustain a conviction for possession, this Court has not expressly considered whether possession of some particular quantity of narcotics might nonetheless be necessary to justify a jury's

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[4] Cont. percentage of methamphetamine remaining in the vial was sufficient to cause a physical effect in a particular instance; however, he was certain that methamphetamine was present (T. at 74, 97-98).

On cross examination defense counsel asked the following question: . . . .[W]e don't know how much real amphetamine may be in this sample, but it's certainly less than 100 percent of 25 milligrams or 15 milligrams?" Terkelson responded: "Yes, I would agree with that." Defense counsel then asked: "So we could be -- maybe as low as five to ten milligrams perhaps?" Terkelson responded: "Perhaps" (T. at 92). Based on the foregoing testimony it is clear that Terkelson's estimation of five to ten milligrams went to the possible amount of amphetamine contained in the approximately 15 to 25 milligrams of methamphetamine he observed in the vial.

conclusion that a defendant had knowledge of the presence and narcotic character of the drug in his possession.

Upon review of pertinent case law it appears that the quantity of controlled substance becomes vital only in the absence of other evidence of intent. See State v. Winters, 16 Utah 2d 139, 396 P.2d 872, 873-74 (1964) (where drugs were discovered inside mattress located in defendant's former cell the Utah Supreme Court found the evidence sufficient to justify the jury's conclusion that defendant had knowledge of both his possession and the narcotic effect of the drug without considering the specific amount). The evidence presented at defendant's trial was sufficient to establish that he knowingly and intentionally exercised dominion and control over the methamphetamine found in his possession. Defendant does not dispute that he placed a brown bag containing a vial, metal straw and mirror in his jacket pocket. The vial contained a clearly visible amount of approximately 15 to 25 milligrams of the controlled substance methamphetamine. Based on the foregoing facts, a jury could reasonably conclude that defendant exercised a knowing and intentional possession.

Where, as here, the controlled substance is clearly visible, some courts have found it unnecessary to consider whether the record contained other evidence of a knowing and intentional possession, relying solely on a visible amount of controlled substance to establish the intent element of the offense. Under either view, the evidence in this case was clearly sufficient to establish defendant's knowing and intentional possession of the controlled substance

methamphetamine.

Alternatively, defendant attacks his sentence as being cruel and unusual under the eighth amendment. However, the indeterminate term not to exceed five years which is applicable to third degree felonies was clearly proportionate to the gravity of defendant's conviction for possession of a controlled substance. Furthermore, defendant's sentence falls within statutorily imposed limits and thus carries with it a strong presumption of constitutionality. Moreover, the record is devoid of any indication that the trial court abused its discretion in denying defendant's request to be placed on probation and imposing the statutory term. This Court should affirm the lower court's ruling.

ARGUMENT

POINT I

DEFENDANT WAS PROPERLY CONVICTED OF A KNOWING AND INTENTIONAL POSSESSION OF THE CONTROLLED SUBSTANCE METHAMPHETAMINE.

Defendant was convicted of possession of a controlled substance in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1987) which provides that it is unlawful "for any person knowingly and intentionally to possess or use a controlled substance . . . ." He was found to be in possession of a vial containing approximately 15 to 25 milligrams of a white powdery substance, as well as other drug paraphernalia including a metal straw, mirror and razor blade (T. at 21, 75). Tests performed on the substance in the vial and on residue collected from the metal straw revealed the presence of the controlled substance

methamphetamine (T. 67-68, 74-76, 91). Defendant seeks reversal on the ground that the amount of methamphetamine found in the vial and metal straw was simply insufficient to demonstrate that he knowingly and intentionally possessed a controlled substance (Br. of App. at 8-9). In support of his argument defendant urges this Court to reconsider its recent opinion in State v. Warner, 788 P.2d 1041 (Utah Ct. App. 1990), and adopt a minority view which requires possession of a usable amount of a controlled substance.[5]

At the outset it is important to clarify Utah case law on this issue. In Warner, this Court rejected an interpretation of section 58-37-8(2)(a)(i) that would have required possession of a "usable amount" to sustain a conviction for possession of a controlled substance. Id. at 1043-44 (section 58-37-8(2)(a)(i) does not require possession of a sufficient quantity of illegal substance to cause a physical effect). See State v. Winters, 16 Utah 2d 139, 396 P.2d 872, (1964) (the determinative test in Utah "is possession of a narcotic drug, and not usability of a narcotic drug").[6] Although both this Court and the Utah Supreme Court have clearly rejected the requirement of some specific "usable amount" in order to sustain a conviction for possession, neither Warner nor Winters expressly considered whether

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[5] Defendant places primary reliance on policies and case law expressly rejected by this Court in Warner, 788 P.2d at 1042-43.

[6] This position is consistent with the majority of jurisdictions. Id. (citing People v. Harrington, 396 Mich. 33, 238 N.W.2d 20, 25 (1976); Hampton v. State, 498 So.2d 384, 386 (Miss. 1986); People v. Mizell, 72 N.Y.2d 651, 536 N.Y.S.2d 21, 22-23, 532 N.E.2d 1249, 1250-51 (1988)).

possession of some particular quantity of narcotics might nonetheless be necessary to justify a jury's conclusion that a defendant had knowledge of the presence and narcotic character of the drug in his possession.[7] Significantly, both Warner and Winters acknowledge that "several courts have held that no particular quantity of narcotics is necessary to sustain a conviction for possession of a narcotic drug." Warner, 788 P.2d at 1043 (quoting Winters, 396 P.2d at 874). In support of this position, this Court explained that "[e]ven in jurisdictions that advance the majority view that any amount of illegal substance is sufficient to make out the offense of possession, the prosecution must still prove the essential element of knowledge." Id. at 1043 n.3 (citing Harrington, 238 N.W.2d at 24 ("It is only when these two requirements are present that an individual may be found guilty of possession, even by applying the majority rule")). Thus, no particular amount of controlled substance is, by itself, determinative of a knowing and intentional possession. Id.

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[7] This precise question appears to have been left open by this Court in Warner and by the Utah Supreme Court in Winters. In Warner, this Court expressly noted that the defendant did not argue that the State failed to prove he had knowledge of the drug's presence and its narcotic character, or that a particular minimum quantity of methamphetamine was necessary to prove that he "knowingly and intentionally" possessed the drug. Therefore, this Court's opinion was limited to a rejection of Warner's narrow argument that section 58-37-8(2)(a)(i) implied a "usable amount" requirement. Id. at 1043. In Winters, the drugs were discovered in defendant's former cell inside his mattress; therefore, the Utah Supreme Court simply found the evidence sufficient to justify the jury's conclusion that defendant had knowledge of both his possession and the narcotic effect of the drug. Winters, 396 P.2d at 873-74.

In Warner, this Court attempted to distinguish two apparently differing views as to the State's burden of proof on the issue of a knowing and intentional possession. Id. at 1043 n.3.[8] However, viewing the cases as a whole it appears that the quantity of controlled substance becomes vital only in the absence of other evidence of intent. See, e.g., Benson, 509 P.2d at 556 (when there is present in the record other evidence of intent . . . . then all that is needed to sustain a conviction is that amount of controlled substance necessary for identification); Siirila, 193 N.W.2d at 473 (where traces of marijuana were discovered in a jacket shown to belong to defendant and to have been worn by him, court found that it was a permissible inference that whatever was in the jacket was there with his knowledge); Theel, 505 P.2d at 965 (where less than a milligram of marijuana was found in three clear plastic baggies located in pocket of jacket defendant had borrowed from a friend,

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[8] Without expressing a preference for either view this Court noted:

> Some jurisdictions advocate that since knowledge may be proven by circumstantial evidence, possession alone of a trace or minute quantity of contraband infers knowledge. See e.g., State v. Siirila, 292 Minn. 1, 193 N.W.2d 467, 473 (1971), cert. denied, 408 U.S. 925, 92 S.Ct. 2503, 33 L.Ed.2d 336 (1972); People v. Mizell, 72 N.Y.2d 651, 536 N.Y.S.2d 21, 24, 532 N.E.2d 1249, 1252 (1988). However, other courts have found, to the contrary, that possession of a minute amount of illegal drugs alone, is insufficient to justify an inference of knowledgeable possession. See e.g., State v. Theel, 180 Colo. 348, 505 P.2d 964, 965-66 (1973) (en banc); People v. Hunten, 115 Mich.App. 167, 320 N.W.2d 68, 70 (1982) (per curiam); Sheriff, Clark County v. Benson, 89 Nev. 160, 509 P.2d 556 (1973).

court found that the record failed to reveal any evidence establishing the element of knowledge); Hunten, 320 N.W.2d at 70 (court found that the amount of controlled substance was not visible to the naked eye and that there was nothing in the record from which an inference could be drawn that defendant was aware of the substance).[9] See Winters, 396 P.2d at 873-74 (where drugs were discovered inside mattress located in defendant's former cell the Utah Supreme Court simply found the evidence sufficient to justify the jury's conclusion that defendant had knowledge of both his possession and the narcotic effect of the drug). See also Judd v. State, 482 P.2d 273, 280 (Alaska 1971) (where facts show knowing possession it is unnecessary that a usable amount quantity be found).[10]

In the present case, it is clear from the record that defendant was knowingly and intentionally in possession of the controlled substance methamphetamine. The vial was located inside defendant's jacket pocket and contained a clearly visible amount of approximately 15 to 20 milligrams of methamphetamine

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[9] The Hunten court's determination that there was nothing in the record from which an inference of knowledgeable possession could be drawn overlooks the fact that the substance was taken from drug paraphernalia found inside a secret compartment that had been built into the tongue of defendant's shoe while he was an inmate at the Muskegon Correctional Facility. Id. at 68.

[10] Where the controlled substance is determined to be clearly visible, some courts hold that there is a sufficient amount to infer a knowing and intentional possession. Harrington, 238 N.W.2d at 27 (mens rea threshold was successfully crossed where defendant was found in possession of bottle caps with white heroin encrustation apparent to the naked eye); Mizell, 532 N.E.2d at 1250 (court inferred knowing possession where defendant was found in possession of two vials containing visible cocaine residue).

(T. at 75, 109-112). In addition, defendant admits that he put the brown bag in his jacket pocket and that he knew the bag contained a mirror, vial and straw (T. at 109-112). He further admits that he didn't think there was anything in the bottle at the time because he "could have" ingested its contents previously (T. at 112-115). Thus, a jury could reasonably conclude from the above facts that defendant knowingly and intentionally exercised dominion and control over the methamphetamine in the vial. See Winters, 396 P.2d at 874 (State "must prove that the accused exercised dominion and control over the drug with knowledge of its presence and narcotic character").

POINT II

DEFENDANT'S SENTENCE DOES NOT IMPLICATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Defendant argues that it was cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution for the trial court to impose a statutory indeterminate term not to exceed five years "for an offense involving an unusable and valueless amount of methamphetamine" (Br. of App. at 19). Defendant's argument is without merit.

In State v. Bishop, 717 P.2d 261, 269 (Utah 1986), the Utah Supreme Court applied a proportionality test to determine whether the sentence imposed was proportionate to the crime for which the defendant had been convicted.[11] In so doing, the court

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[11] The court balanced three factors in its analysis:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same

noted that "[o]nly rarely will a statutorily prescribed punishment be so disproportionate to the crime that the sentencing statute is unconstitutional." Id. Because "sentencing statutes are necessarily based on numerous, imprecise considerations," in Solem v. Helm, 463 U.S. 277 (1983), the Supreme Court stated that "substantial deference must be accorded to the prerogatives of legislative power in 'determining the types and limits of punishments for crimes.'" Id. (quoting Solem v. Helm, 463 U.S. at 290).

In the present case, this Court must grant substantial deference to the trial court's imposition of the statutorily mandated sentence. Defendant was found guilty of possession of approximately 15 to 25 milligrams of the controlled substance methamphetamine,[12] possession of which amount the legislature has classified as a third degree felony.[13] Clearly, defendant's sentence falls within prescribed statutory limits and thus carries a strong presumption of constitutionality. United States v. Newsome, 898 F.2d 119, 122 (10th Cir.) (noting that within the strictures of the eighth amendment the determination of proper

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[11] Cont. jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions.

Id. (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)).

[12] See Utah Code Ann. § 58-37-4(2)(b)(iii)(B) (1990).

[13] See Utah Code Ann. § 58-37-8(2)(b)(ii) (1990). See also Utah Code Ann. § 76-3-203(3) (1990) authorizing imposition of an indeterminate term not to exceed five years for conviction of a third degree felony. Under Utah's Sentence and Release Guidelines, defendant could be eligible for parole after having served only six months of his sentence, or at the latest after having served only 18 months. See form 4, appendix H.

criminal penalties is a matter for legislative bodies and a sentence within the prescribed statutory limits generally will not be found to be cruel and unusual), cert. denied, ___ U.S. ___, 111 S.Ct. 207 (1990).

Notwithstanding the above, defendant appears to argue that because the use of illegal substances is prevalent in our society, no useful purpose is served by imprisoning arguably casual drug offenders and thus the harshness of his prison sentence is disproportionate to the gravity of his possession conviction (Br. of App. at 20). Contrary to defendant's assertion, imposition of an indeterminate term not to exceed five years is clearly proportionate to the gravity of the crime for which he was convicted.[14] As noted in point I of this brief, this Court expressly rejected a policy argument similar to that of the defendants in Warner when it refused to read a "usability requirement" into Utah's Controlled Substances Act. Id. at 1043 (rejecting rationale that possession of quantities too small to be used do not pose the type of danger the legislature contemplated).[15] Other courts similarly recognize that drug

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[14] Because defendant's argument appears to focus solely on the first of three factors for determining proportionality set forth in Bishop, 717 P.2d at 269, the State likewise limits its analysis of defendant's claims to a consideration of whether the gravity of the offense is proportionate to the harshness of the penalty and assumes defendant has no concerns regarding the sentences imposed on other criminals in this jurisdiction or the sentences imposed for possession of a controlled substance in other jurisdictions. See Br. of App. at 18-19.

[15] Significantly, this Court upheld section 58-37-8(5)(a)(iii) of the Controlled Substances Act as constitutional when it was challenged on equal protection and due process grounds in State v. Stromberg, 783 P.2d 54, 60 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990). The section provides enhanced penalties

offenses are at the root of some of the gravest problems facing our country and note the existence of a strong public policy against the illegal use of controlled substances. See, e.g., United States v. Meirovitz, 918 F.2d 1376, 1381 (8th Cir. 1990); Newsome, 898 F.2d at 122 (noting the concerns of Congress and society about drugs); State v. Wise, 164 Ariz. 574, 795 P.2d 217, 219 (Ariz. App.) (noting existence of strong public commitment to eradicating the use of illicit drugs), review denied, ___ Ariz. ___ (1990); State v. Anderson, 210 N.J.Super 669, 510 A.2d 332 (N.J. Super. L. 1986) (finding rational legitimate basis in regulatory purposes for dissuading possession and use of drugs while operating motor vehicle). In light of the Utah legislature's obvious and legitimate concern with prohibiting possession of even minute amounts of illicit drugs, together with the fact that defendant's sentence falls within legislatively prescribed limits, his sentence simply fails to "shock the moral sense of all reasonable men as to what is right and proper under the circumstances." State v. Russell, 791 P.2d 188, 190 (Utah 1990) (setting forth test for determining whether punishment is cruel and unusual in specific applications).

Alternatively, defendant appears to assert that the trial court failed to afford proper weight to certain factors mitigating in favor of his being placed on probation. He further asserts that the presentence report was "flawed and erroneous."

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[15] Cont. for convicted drug offenders, whether trafficking or not, where the offenses occur in close proximity to schools. In upholding the section this Court noted that it was reasonably related to the legislative purpose of creating a drug-free environment around school children. Id. at 59-60.

As a result, defendant argues, he "received a much harsher sentence than would be warranted by the objective facts of his background and criminal history" (Br. of App. at 18-19).

The Utah Supreme Court has clearly stated that a reviewing court will not overturn the sentence imposed by a lower court unless the sentence represents an abuse of discretion, the lower court failed to consider all legally relevant factors, or the sentence exceeds statutorily imposed limits. State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989) (citations omitted). See United States v. Hack, 782 F.2d 862, 870 (10th Cir.) (noting that an appellate court is without the proper authority to modify or change a sentence merely upon the claim that it is too severe), cert. denied, 476 U.S. 1184 (1986).

In the present case, although defendant attacks the criteria the trial court allegedly relied upon in imposing sentence at the sentencing hearing, he has failed to include a transcript of his sentencing hearing in the record before this Court for review.[16] Nor has he provided a copy of his presentence report. The record before this Court is otherwise devoid of any indication that the trial court employed improper assumptions, mechanically imposed sentence or refused to exercise its discretion to individualize defendant's sentence. United States v. Bonilla Romero, 836 F.2d 39, 47 (1st Cir.) (where

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[16] Although it is apparent from the record that defendant requested and the trial court ordered preparation of the sentencing transcript to be included in the record on appeal, the sentencing transcript has not been included in the record before this Court. See R. at 232, 251.

sentence imposed was not grossly disproportionate to the crime committed and was within statutory limits, court found no abuse of discretion), cert. denied, 488 U.S. 817 (1988). Where, as here, the defendant has failed to see that the record contains materials necessary to support his appeal, this Court must assume the regularity of the proceedings below and affirm the trial court's ruling. State v. Robbins, 709 P.2d 771, 773 (Utah 1985); State v. Theison, 709 P.2d 307, 309 (1985) (when crucial matters are not included in the record, the missing portions are presumed to support the action of the trial court).[17] Thus, based on the record before this Court, it is reasonable to conclude that the trial court did not abuse its discretion in sentencing defendant to the statutory indeterminate term not to exceed five years.

CONCLUSION

Based on the foregoing, the State of Utah respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY submitted this 26th day of February, 1991.

R. PAUL VAN DAM
Utah Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

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[17] However, notwithstanding the above, the record before this Court provides an adequate factual basis for the sentence imposed. On October 5, 1989, defendant was released on bail pending imposition of sentence (R. at 136-37). After defendant failed to appear for a hearing, a bench warrant was issued for his arrest and his bail revoked on November 9, 1989 (R. at 140-42). Based on defendant's demonstrated inability to comply with the conditions of his bail agreement, it cannot reasonably be argued that the trial court abused its discretion in denying defendant's request that he be placed on probation in lieu of serving the statutory term.

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing brief of Appellee were mailed, postage prepaid, to John D. Russell, 10 West Broadway, Suite 500, Salt Lake City, Utah 84101, on this 26th day of February, 1991.

Marian Decker

ADDENDUM A

THE COURT: MR. MILLER.

MR. MILLER: WITH REGARD TO THE POSSESSION OF CONTROLLED SUBSTANCE, THE STATUTE DOES NOT REQUIRE A MINIMUM AMOUNT OF A SUBSTANCE THAT A PERSON MUST POSSESS IN ORDER TO BE GUILTY. THERE ARE OTHER CHARGES WHICH DO SET A STANDARD OF POSSESSION WITH INTENT TO DISTRIBUTE, WHICH CAN BE ESTABLISHED BY POSSESSION OF A CERTAIN QUANTITY, BUT THE SIMPLE POSSESSION DOES NOT REQUIRE A MINIMUM AMOUNT OF SUBSTANCE IN ORDER TO BE FOUND GUILTY. ANY AMOUNT WHICH CAN BE DETERMINED BY SCIENTIFIC TESTS TO CONTAIN THE SUBSTANCE IS SUFFICIENT TO ESTABLISH THE CHARGE. I WOULD SUBMIT IT ON THAT.

WITH REGARD TO THE FIREARM CHARGE, ONCE AGAIN, I DISAGREE WITH THE INTERPRETATION OF THE STATUTE. THE STATUTE CLEARLY MAKES IT A CLASS "A" MISDEMEANOR TO CARRY A LOADED FIREARM CONCEALED ON -- ANYWHERE, BUT IN THIS CASE ON HIS PERSON. AND THE FACT THAT HE WOULD NOT HAVE BEEN OUT OF THE CAR EXCEPT FOR THE OFFICER TELLING HIM TO GET OUT OF THE CAR DOESN'T MAKE IT ANY LESS OF A CRIME. IT WAS A CRIME WHEN HE WAS IN THE CAR IF IT WAS CONCEALED AND LOADED. THE ONLY WAY THAT IT COULD HAVE NOT BEEN A CRIME WAS TO HAVE BEEN UNLOADED, AND BEEN IN A SECURE PACKAGE OR PARCEL. IT WOULD HAVE BEEN A CLASS "B" MISDEMEANOR HAD IT BEEN UNLOADED, BUT IT WAS AND CONCEALED. BUT BECAUSE IT WAS CONCEALED AND BECAUSE IT WAS LOADED, IT'S A CLASS "A" MISDEMEANOR. AND I SUBMIT IT ON THAT.

THE COURT: AS TO YOUR FIRST MOTION, COUNSEL, THE

COURT'S NOT PREPARED TO SAY THAT QUANTITY IS INSUFFICIENT AS A MATTER OF LAW. THE COURT'S FAMILIAR PERSONALLY WITH CASES WHERE THE ENTIRE QUANTITY WAS USED UP IN THE ANALYSIS AND THE COURT STILL HELD THAT IT'S SUFFICIENT TO SHOW POSSESSION. IN THIS CASE, IT'S SIGNIFICANTLY MORE THAN THAT. IN VIEW OF THE TESTIMONY THAT THERE IS ENOUGH OF A QUANTITY STILL REMAINING, THAT IT'S IDENTIFIABLE, AND IT ISN'T JUST ON THE PERIPHERY EDGE OF THE GLASS, I THINK THE TESTIMONY IS THAT WHAT KIND OF -- WHAT KIND OF OR EVEN THE OBTAINING OF A HIGH WOULD DEPEND ON A NUMBER OF FACTORS, THE PURITY, THE QUANTITY, AND ALSO THE RECIPIENT. SO THE COURT'S REALLY NOT PREPARED TO GRANT A MOTION ON THE BASIS THAT THE EVIDENCE THAT WAS ADDUCED AT TRIAL AND THE EVIDENCE ALL BEING IN AT THIS POINT.

AS TO THE CONCEALED WEAPON QUESTION, I THINK THERE MAY OR MAY NOT HAVE BEEN A CRIME EARLIER IN THE CAR, DEPENDING ON HOW THE FACTS WERE INTERPRETED AT THAT TIME. BUT THE ONLY EVIDENCE BEFORE THE JURY IN THIS COURT IS, WHAT HAPPENED OUTSIDE OF THE CAR, AND I THINK THERE IS SUFFICIENT FOR A JURY TO MAKE A DETERMINATION ONE WAY OR ANOTHER ON THE RELEVANT FACTS THERE OF -- ONE, OF THEM BEING WHETHER OR NOT THAT VEHICLE WAS -- THAT WEAPON WAS LOADED. SO I THINK THERE IS SOMETHING FOR THE JURY TO -- TO ADDRESS IN THAT, SO I'LL DENY BOTH OF YOUR MOTIONS. ANYTHING FURTHER?

MR. MILLER: NO.

THE COURT: ALL RIGHT. LET'S GO BACK OUT.